Supreme Court, U.S.
FILED

NO. 94-2029 MAY 18 1995

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

SUSAN L. FIELDS,

Petitioner,

vs.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL D. PORTNOY
Attorney for Petitioner
Pheils & Wisniewski
410 Louisiana Avenue
Perrysburg, Ohio 43551
(419) 874-3177

27 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit Court of Appeals ruled erroneously when concluding that the Administrative Law Judge (ALJ) based his findings on substantial evidence.

2. Whether the Sixth Circuit Court of Appeals erred by failing to address whether the ALJ asked proper hypothetical questions to both vocational experts at both administrative hearings.

3. Whether the Sixth Circuit Court of Appeals failed to interpret liberally the Social Security Act in Claimant's favor.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	v
Reported Opinion	1
Jurisdictional Statement	2
Statement of the Case	3
A. Procedural History	3
Reasons for Granting the Writ	5
I. The Sixth Circuit Court of Appeals erred in concluding the Administrative Law Judge (ALJ) based his findings on substantial evidence.	5
II. The Sixth Circuit Court of Appeals erred by failing to address whether the ALJ asked proper hypothetical questions to both vocational experts at both administrative hearings.	9
III. The Sixth Circuit Court of Appeals failed to interpret liberally the Social Security Act in Claimant's favor.	11

Contents

Page

Conclusion 12

APPENDIX

Appendix A -- Judgment and Opinion from the United States Court of Appeals for the Sixth Circuit Filed December 21, 1994 ..... 1a

TABLE OF AUTHORITIES

	Page
Cases Cited:	
Allen v. Weinberger, 552 F.2d 781 (CA7, 1977)	6
Brand v. Secretary of HEW, 623 F.2d 523 (CA8, 1980)	11
Branham v. Gardner, 383 F.2d 614 (CA6, 1967)	6
Brittingham v. Weinberger, 408 F. Supp. 606 (E.D., Pa., 1976)	6
Broadbent v. Harris, 698 F.2d 407 (CA10, 1983)	6
Catron v. Weinberger, 394 F. Supp. 1011 (D.C. Va., 1975)	10
Cole v. Harris, 641 F.2d 613 (CA8, 1981)	11
Combs v. Gardner, 382 F.2d 949 (CA6, 1977)	11
Conklin v. Celebrezze, 319 F.2d 569 (CA7, 1963) ...	11
Coulter v. Weinberger, 527 F.2d 224 (CA3, 1974) ...	6
Diabo v. Secretary of HEW, 200 App. D.C. 225, 627 F.2d 278 (1980)	6
Doran v. Schweiker, 681 F.2d 605, 607 (CA9, 1982) .	11
Garner v. Heckler, 745 F. 2d 383 (6th Cir., 1984) ...	5

Authorities

	Page
Hoffman v. Gardner, 369 F.2d 837 (CA8, 1966)	11
Lashley v. Secretary of HHS, 708 F.2d 1048 (CA8, 1983)	6
Mandrell v. Weinberger, 511 F.2d 1102 (CA10, 1975)	11
Marcus v. Califano, 615 F.2d 23 (CA2, 1979)	61
Maziara v. Secretary of Health and Human Services, 837 F. 2d 240, 243 (6th Cir., 1987)	5
McMillian v. Schweiker, 697 F.2d 215, 220 (6th Cir., 1983)	9
Miracle v. Celebrezze, 351 F.2d 361 (CA6, 1965) ...	6
Mitchell v. Schweiker, 699 F.2d 185 (CA4, 1983) ...	6
Murphy v. Schweiker, 524 F. Supp. 228 (E.D., Pa., 1981)	6
Nelson v. Heckler, 712 F.2d 346 (CA8, 1983)	6
Noe v. Weinberger, 512 F.2d 588 (CA6, 1975)	6
Oldham v. Schweiker, 660 F.2d 1078 (CA5, 1981) ...	6
Richardson v. Perales, 402 U.S. 389, 401 (1971)	5

Authorities

Page

Schisler v. Heckler, 787 F.2d 76 (CA2, 1986) 7

Silcox v. Richardson, 331 F. Supp. 460 (W.D., W. Va., 1971) 6

Smith v. Schweiker, 646 F.2d 1075 (1981) 6

Thomas v. Weinberger, 398 F. Supp. 1034 (D.C. Kan., 1975) 10

Trile v. Weinberger, 392 F.2d 1193 (D.C. Ga., 1975) . 10

United States v. Walters, 638 F. 2d 947 (6th Cir. 1981) 4

REPORTED OPINION

The judgment and opinion sought to be reviewed is from the United States Court of Appeals for the Sixth Circuit, unreported as *Susan L. Fields v. Secretary of Health and Human Services*, No. 94-3009 (Sixth Circuit Court of Appeals, December 21, 1994).

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was announced and filed on December 21, 1994.

This Court extended Petitioner's time to file her Petition until May 20, 1995.

This Court has jurisdiction to review the judgment of the United States Court of Appeals in this case pursuant to 28 U.S.C. §1254.

STATEMENT OF THE CASE

A. Procedural History

On September 29, 1989, Ms. Fields applied for disability benefits with the Social Security Administration. (TR 19) Ms. Fields' alleged disability since April 13, 1988 (Exhibit 1) because of severe pain, preventing her from standing, sitting or walking without changing positions, because her spine "burns and is extremely tender to the touch, and the surrounding tissues and muscles became tight with aching pain." (Exhibit 1, TR 205) Ms. Fields noted she is lucky to get five hours of sleep or rest because the pain wakes her up (Id.), and this resulted from two back surgeries, one in 1980 with removal of two discs and another back surgery in 1984 for a bone fusion. (Id.) Ms. Fields became unable to work on April 13, 1988 (Exhibit 1, TR 205) and was initially determined not disabled on December 1, 1989. (TR 185-186). A reconsideration affirmed this adverse decision. (TR 192-193)

On July 2, 1990, Ms. Fields requested a hearing before the Administrative Law Judge (TR 194-195) and a hearing was held on October 23, 1990. (TR 67) Ms. Fields was represented by attorney Frederick Burkholder, and testified under questioning by the Administrative Law Judge (hereinafter ALJ). After the hearing, a written decision (TR 49 - 63) was issued by the ALJ finding Ms. Fields not disabled. The appellate level, however, remanded this cause of action to determine the extent of the nature and severity of Ms. Fields' mental impairment. (TR 43)

A second hearing was conducted on April 23, 1992 whereupon once again, Ms. Fields was represented by Frederick Burkholder. Once again, the ALJ denied claimant's disability

benefits. (TR 16-33) Whereupon Ms. Fields requested review by the appeals council (TR 6-7), and the appeals council denied review in a notice dated October 2, 1992. (TR 3) Ms. Fields then commenced this action pursuant to 42 U.S.C. §405(g).

On April 19, 1993, Plaintiff-Appellant filed her Motion for Summary Judgment with a Supporting Memorandum. On June 22, 1993, the Secretary filed her Motion for Summary Judgment with a Supporting Memorandum.

On July 26, 1993, the Magistrate issued his report and recommendation, recommending Plaintiff-Appellant's Motion for Summary Judgment be granted and Defendant's Motion for Summary Judgment be denied. Attached to this recommendation, was a Notice that either party had ten (10) days to file objections to this recommendation or pursuant to *United States v. Walters*, 638 F. 2d 947 (6th Cir. 1981), untimely filed objections foreclosed appeal to the Court of Appeals.

On November 30, 1993, the District Court summarily dismissed Plaintiff-Appellant's claim and granted Defendant's Summary Judgment Motion. On December 27, 1993, Plaintiff-Appellant filed her Notice of Appeal.

On December 21, 1994, the United States Sixth Circuit Court of Appeals affirmed the District Court's Summary Judgment in favor of the Secretary.

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THE ADMINISTRATIVE LAW JUDGE (ALJ) BASED HIS FINDINGS ON SUBSTANTIAL EVIDENCE.

A cursory reading of the ALJ's decisions may, at first leave the reader to believe he dealt with the evidence of record. Careful scrutiny of his findings, however, and evaluation of the evidence show the critical portions of his findings are completely unsubstantiated and do not support his findings.

This Court, as well as other Courts, defined substantial evidence as:

> "More than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion ... In determining this question, we must examine the evidence in the record taken as a whole and must take into account whatever in the record fairly detracts from its weight." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), *Maziara v. Secretary of Health and Human Services*, 837 F. 2d 240, 243 (6th Cir., 1987), *Garner v. Heckler*, 745 F. 2d 383 (6th Cir., 1984).

The criteria for judging whether substantial evidence is present to support the ALJ's decision is: (1) objective medical facts on clinical findings, (2) diagnoses of attending physicians, (3) subjective evidence of pain and disability as testified to by

the claimant and others, and (4) the claimant's age, education, and work history. *Smith v. Schweiker*, 646 F.2d 1075 (1981); *Noe v. Weinberger*, 512 F.2d 588 (CA6, 1975); *Allen v. Weinberger*, 552 F.2d 781 (CA7, 1977) and *Marcus v. Califano*, 615 F.2d 23 (CA2, 1979).

An ALJ's decision is not based on substantial evidence unless he considers the combined effects of all of Claimant's impairments. *Silcox v. Richardson*, 331 F. Supp. 460 (W.D., W. Va., 1971); *Murphy v. Schweiker*, 524 F. Supp. 228 (E.D., Pa., 1981); *Brittingham v. Weinberger*, 408 F. Supp. 606 (E.D., Pa., 1976). The Sixth Circuit has long recognized a person's mental condition can interact with a physical impairment and render a person disabled even though the physical impairment by itself is not disabling. *Branham v. Gardner*, 383 F.2d 614 (CA6, 1967); *Miracle v. Celebrezze*, 351 F.2d 361 (CA6, 1965).

Not only must the ALJ's decision be based upon substantial evidence, the ALJ has the duty to investigate all matters in issue and to develop the comprehensive record required for a fair determination of disability. *Diabo v. Secretary of HEW*, 200 App. D.C. 225, 627 F.2d 278 (1980); *Coulter v. Weinberger*, 527 F.2d 224 (CA3, 1974).

In determining the question of substantiality of evidence, the reports of physicians who have treated a patient over a period of time and who are consulted for purposes of treatment are given greater weight than are reports of physicians employed and paid by the government for the purposes of defending against a disability case. *Broadbent v. Harris*, 698 F.2d 407 (CA10, 1983); *Lashley v. Secretary of HHS*, 708 F.2d 1048 (CA8, 1983); *Nelson v. Heckler*, 712 F.2d 346 (CA8, 1983); *Mitchell v. Schweiker*, 699 F.2d 185 (CA4, 1983); *Oldham v. Schweiker*, 660 F.2d 1078 (CA5, 1981).

Furthermore, a treating physician's opinion of a subject of medical disability is binding on the fact finder unless it is contradicted by substantial evidence and, indeed, the treating doctor's opinion is entitled to extra weight because he/she is usually more familiar with the claimant's medical condition than are other physicians. *Schisler v. Heckler*, 787 F.2d 76 (CA2, 1986).

Turning to the facts of this case, the completely uncontradicted testimony establishes Claimant has severe, residual pain that prevents her from engaging in any remunerative employment.

On February 3, 1989 Dr. Shang Y. Rhee, M.D. diagnosed Plaintiff as having chronic pain syndrome due to myofacial strain, status post op lumbar laminectomies, fusion and chronic myofacial strain of the lumbar paraspinal muscles (Tr. at 234, 235).

Dr. Rhee stated Claimant needed education for chronic pain syndrome, progressive exercises for musculoskeletal system and Plaintiff-Appellant should consider serteonergic or tricylic agent for sleep difficulties and pain to exhibit control (Tr. 239).

Sonya Owens' O.T.R./L October 27, 1988's extensive findings detailed Plaintiff-Appellant's severe pain and mobility restrictions (Tr. 240-243).

Dr. Cox, the Government's own doctor, testified Plaintiff-Appellant may in fact suffer pain and no matter what activity she engages, would not relieve her pain (Tr. 110) Cox further testified it was reasonable to suggest Plaintiff-Appellant has a very low threshold for pain and is incapable of performing physical activities! (Tr. 110).

Dr. Gottfried Spring, the Government's own psychologist, testified because of Claimant's psychological conditions, she would be limited to a low-stress type job, or a job of a simple nature (Tr. 113) and from an exertional standpoint, all Plaintiff-Appellant could do would get on a treadmill and perform whatever exercise is needed (Tr. 115), and Plaintiff-Appellant could not be pushed physically as of April 23, 1992, and did not know at what point she could be pushed physically (Tr. 116).

While the ALJ concluded Dr. Darlene Barnes', Ph.D., psychological opinion is entitled to great weight, he never addressed the following concerning Dr. Barnes' medical diagnosis of Plaintiff-Appellant:

a) Dr. Barnes concluded Plaintiff-Appellant's testing on an MMPI was valid, suggesting she's in acute turmoil with reports of chronic pain (Tr. 366);

b) Dr. Barnes noted because of Plaintiff-Appellant's extensive surgery on her back as well as other areas of her body, her complaints of chronic pain are legitimate (Tr. 267);

c) Dr. Barnes concluded Plaintiff-Appellant's complaints of pain are both legitimate as well as symptomatic in nature and psychological factors in part contributed to Plaintiff-Appellant's current state of pain (Tr. 367);

d) Dr. Barnes concluded Plaintiff-Appellant would not be able to stand the stress and pressures associated with day-to-day work activity load, (Tr. 369) and Plaintiff-Appellant's other work-related activities would be limited because of her back surgeries limiting her mobility, lifting, standing, sitting, and most likely weight restriction limits (Tr. 375).

This evidence, that was not included in the ALJ's May 6, 1992 denial, objectively establishes Plaintiff-Appellant's complaints of chronic pain. Nothing exists to contradict otherwise.

II.

THE SIXTH CIRCUIT COURT OF APPEALS ERRED BY FAILING TO ADDRESS WHETHER THE ALJ ASKED PROPER HYPOTHETICAL QUESTIONS TO BOTH VOCATIONAL EXPERTS AT BOTH ADMINISTRATIVE HEARINGS.

The only time the vocational experts testified Claimant could perform medium to light work occurred when the ALJ asked a hypothetical question absent Claimant's pain and restrictions. This hypothetical question was completely improper. As noted in *McMillian v. Schweiker*, 697 F.2d 215, 220 (6th Cir., 1983), this Circuit addressed such improper, hypothetical question in the following manner:

> "A vocational expert's response to a hypothetical constitutes substantial evidence only where the hypothetical question precisely sets forth all of the Claimant's physical and mental impairments. (Id.) We, therefore, reverse the Judgment of the District Court and remand the case with directions to grant summary judgment for McMillian." (Id. at 220)

Other Courts hold that a hypothetical question proposed by the ALJ to the vocational expert was insufficient to support a denial of Social Security disability benefits when the record did not support facts given in the hypothetical. *Trile v. Weinberger*, 392 F.2d 1193 (D.C. Ga., 1975); *Catron v. Weinberger*, 394 F. Supp. 1011 (D.C. Va., 1975); *Thomas v. Weinberger*, 398 F. Supp. 1034 (D.C. Kan., 1975).

When both vocational experts in this case were asked proper hypotheticals, concerning Plaintiff's ability to work regarding her complaints of pain and limitations, both experts said Claimant could not perform any work. Such should have been the hypothetical question used by the ALJ rather than his obvious, improper question proposed upon both experts.

III.

THE SIXTH CIRCUIT COURT OF APPEALS FAILED TO INTERPRET LIBERALLY THE SOCIAL SECURITY ACT IN CLAIMANT'S FAVOR.

As a remedial statute, the Social Security Act should be broadly construed and liberally applied in favor of disability. *Combs v. Gardner*, 382 F.2d 949 (CA6, 1977); *Conklin v. Celebrezze*, 319 F.2d 569 (CA7, 1963); *Hoffman v. Gardner*, 369 F.2d 837 (CA8, 1966); *Mandrell v. Weinberger*, 511 F.2d 1102 (CA10, 1975) and *Marcus v. Califano*, supra.

The Social Security Act is remedial and is to be construed liberally. *Doran v. Schweiker*, 681 F.2d 605, 607 (CA9, 1982).

As noted in *Cole v. Harris*, 641 F.2d 613 (CA8, 1981) and *Brand v. Secretary of HEW*, 623 F.2d 523 (CA8, 1980):

> "These claimants are real people and entitled to have their disabilities measured in terms of their total physiological well-being. Different people react in markedly different ways to similar injuries. A back condition may affect one individual in an inconsequential way, whereas the same condition may severely disable another person who has greater sensitivity to pain or physical condition, due to age, obesity, deformity, or general physical well-being is generally deteriorated."

Plaintiff's uncontroverted evidence of physical limitations, mental limitations, as well as severe pain, which is supported by objective medical and psychiatric testimony and evidence, falls within the liberal interpretation of the Social Security Act. Public policy mandates Claimant should be given the benefit of the doubt regarding her disability.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted, and the judgment of the court below should be reversed.

Respectfully submitted,

MICHAEL D. PORTNOY
Attorney for Petitioner
Pheils & Wisniewski
410 Louisiana Avenue
Perrysburg, Ohio 43551
(419) 874-3177

APPENDIX -- JUDGMENT AND OPINION FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED DECEMBER 21, 1994

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 94-3009

Susan L. Fields,

Appellant,

v.

Secretary of Health and Human Services,

Appellee.

On Appeal From the United States District Court for the Northern District of Ohio.

BEFORE: BROWN, RYAN, and BOGGS, Circuit Judges.

RYAN, Circuit Judge. The plaintiff, Susan L. Fields, appeals from the district court's entry of summary judgment in favor of the defendant, the Secretary of Health and Human Services, affirming the Secretary's decision to deny Social Security Disability Insurance benefits. On appeal, Fields claims that the Secretary's finding that she can perform her past relevant work is unsupported by substantial evidence. In addition, Fields argues that the district court erred in allowing the Secretary to file objections to a magistrate judge's report

after the ten-day filing period expired. We affirm the district court's summary judgment in favor of the Secretary.

I.

Fields is a forty-two year old woman who completed high school and did some college work. She worked full-time from 1978 to 1988 as a handpacker, material handler, and quality control inspector. In 1980, she underwent a laminectomy and discectomy to correct a bulging intervertebral disc in her back. In 1984, Fields underwent a spinal fusion to correct lower back instability in the area of the prior back surgery. In 1989, Fields applied for disability benefits, seeking benefits beginning April 13, 1988. Fields alleged that on April 13, 1988, she reinjured her back and could no longer work due to pain. Her application was denied; pursuant to her request, an administrative law judge (ALJ) held a hearing.

In November 1990, the ALJ found that Fields suffered from severe fibromyalgia and psychological conditions affecting her physical condition. However, the ALJ discounted her subjective complaints of pain as not credible. The ALJ found that Fields's residual functional capacity was medium work, but with the limitation that she perform low stress work involving simple, repetitive tasks. The ALJ concluded that Fields could not perform her past relevant work as a laborer and quality control inspector because of the stress limitation. However, Field's residual functional capacity enabled her to perform other work available in significant numbers in the national economy. Thus, the ALJ concluded that Fields was not disabled. But in August 1991, the Appeals Council vacated the decision, holding that Fields had presented some evidence of mental impairments. The Appeals Council ordered the ALJ to "[o]btain any available updated reports from all treating sources

and obtain a mental status consultative examination with psychological testing, and a medical assessment in order to resolve the above [mental impairment issues]." In May 1992, after a second hearing, the ALJ found that Fields's subjective complaints of disabling pain were not credible and were unsupported by substantial, objective medical and clinical findings. In addition, contrary to his earlier conclusion, the ALJ found that the plaintiff had the residual functional capacity to perform a full range of medium exertional work. The ALJ concluded that Fields could indeed perform her relevant past work. The Appeals Council denied review.

The plaintiff filed this action in the district court, seeking to overturn the Secretary's decision. The parties filed cross-motions for summary judgment, which were referred to a magistrate. On July 26, 1993, the magistrate recommended summary judgment for Fields because the Secretary's decision was not supported by substantial evidence. On that same day,, the magistrate sent notice to the parties that any objections to the magistrate's report and recommendation must be filed within ten days. However, it was not until August 20, 1993, that the Secretary moved to extend the filing time. The Secretary explained:

> Due to a delay in receiving a copy of the Magistrate's Report and Recommendation (through inadvertence and vacations), the agency responsible for the defense of suits of this nature, needs additional time in which to prepare ...its Objection to [the] Magistrate's Report and Recommendation.

(Emphasis added.) Fields objected. The Secretary's motion asked for an extension until August 30. However, the district court did not rule on the motion until August 31. On that date, the district court typed "IT IS SO ORDERED" on Fields's motion papers. Thus, the district court had given the Secretary--on August 31--until August 30 to file objections.

The Secretary tendered objections with the court clerk on September 13, 1993. On September 27, 1993, the plaintiff moved to strike the Secretary's objections as untimely. Finally, on October 18, 1993, the district court entered an order deeming the objections timely:

> Upon a review of the docket sheet for this case, it appears that defendant's objections were filed prior to the Court's ruling on a second motion for extension of time. The objections were filed, and the second motion for extension of time was subsequently denied as moot. In any event, the Court hereby deems the objections timely filed . . . .
>
> Therefore, for the foregoing reasons, good cause appearing, it is
>
> ORDERED that defendant be, and hereby is, granted leave to file its objections nunc pro tunc . . . .

(Emphases added.) On November 30, 1993, the district court granted summary judgment for the Secretary, holding that substantial evidence supported denial of benefits. The district court noted that it had deemed the Secretary's objections timely filed in its October 18 order. The plaintiff filed this timely appeal.

II.

Section 405(g) provides that the Secretary's findings of fact are conclusive if supported by "substantial evidence." 42 U.S.C. §405(g) (1988). Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Kirk v. Secretary of Health & Human Servs*, 667 F.2d 524, 535 (6th Cir. 1981), cert. denied, 461 U.S. 957 (1983). The substantial evidence determination is based on the record as a whole. *Landsaw v. Secretary of Health & Human Servs*, 803 F.2d 211, 213 (6th Cir. 1986). This court may not evaluate the case de novo, resolve conflicts among the evidence, or determine issues of credibility. *Hale v. Secretary of Health & Human Servs*, 816 F.2d 1078, 1082 (6th Cir. 1987).

We have carefully reviewed the record developed before the ALJ and we are satisfied that the Secretary's conclusion that the plaintiff can perform her past relevant work, and therefore is not disabled, is supported by substantial evidence.

III.

Fields also complains that the district court should not have accepted the Secretary's tardy objections. A district court's grant of an extension of time is made "in its discretion." Fed. R. Civ.P. 6(b). The district court ultimately allowed the Secretary to file objections to the October 18 order. However, that order failed to explain why the district court deemed the objections timely. The court mentioned that "good cause appear[ed]" without expressing what constituted the good cause.

The Federal Magistrates Act authorizes district judges to refer specified motions to magistrates, see 28 U.S.C. §636(b)(1)(A), who may "submit ... proposed findings of fact

and recommendations for the disposition" of the motions, §636(b)(1)(B). The magistrate must file the proposed findings and recommendations with the court, and mail a copy to the parties. §636(b)(1)(C). The Act then provides:

> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.

Section 636(b)(1)(C) (emphasis added); see also Fed. R. Civ.P. 72(b).

In *Patterson v. Mintzes*, 717 F.2d 284 (6th Cir. 1983), we noted that the ten-day period may be extended by the district court. Id. at 286-87. We reasoned that §636(b)(1) refers to the filing of objections "as provided by rules of court"; at the least, "rules of court" incorporates the Federal Rules of Civil Procedure. Id. at 287. Specifically, Rule 6(b) provides for enlargement of time periods that are set "by these rules or by a notice given thereunder or by order of court." Id. (quoting Rule 6(b)). A magistrate's order to file objections within ten days is an "order of court" subject to extension via Rule 6(b). Id. Rule 6(b)(2) contains an "excusable neglect" requirement:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done within a specified time, the court for cause shown may at any time in its discretion ... (2) upon motion made after the expiration of the specified period permit the act

> to be done where the failure to act was the result of excusable neglect . . . .

(Emphases added.) Consequently, a party who is on notice of the ten-day[1] period to file objections, and allows the period to expire without moving for an extension of time, must thereafter show excusable neglect in order to enlarge the filing time. We emphasize that the excusable neglect requirement is a hurdle to filing objections, not to district court review of a magistrate's report and recommendation. *Thomas v. Arn*, 474 U.S. 140, 154 (1985). Thus, even if a party cannot show excusable neglect for a failure to file timely, the district court may still review the magistrate's decision.

Here, although the Secretary mentioned "inadvertence and vacations" in her first motion for extension, the district court apparently failed to exercise discretion by not deciding whether those reasons amounted to "excusable neglect." However, we decline to remand the case simply to determine whether excusable neglect exists or to strike the Secretary's objections. The district court here conducted a de novo review of the magistrate's report, District Court op. at 4, and it would serve no purpose to remand the case.

IV.

Accordingly, we **AFFIRM** the district court's summary judgment for the Secretary.

---

[1]The "ten" day period is actually thirteen calendar days because Rule 6(e) adds three days to cover the time for mailing the magistrate's report. *Kent v. Johnson*, 821 F.2d 1220, 1222 (6th Cir. 1987).